

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY BRINKLEY on behalf of
herself and other similarly situated,

Plaintiff,

v.
MONTEREY FINANCIAL
SERVICES, INC.; DOE NO. 1
MONTEREY FINANCIAL
SERVICES, LLC DOES 1 through
100, inclusive,

Defendant.

CASE NO. 16cv1103-WQH-WVG
ORDER

HAYES, Judge:

The matter before the Court is the Motion to Remand filed by Plaintiff Tiffany Brinkley. (ECF No. 12).

I. Background Facts

On October 15, 2013, Plaintiff Tiffany Brinkley (“Plaintiff”) commenced an action against Monterey Financial Services, Inc., in the Superior Court of the State of California for the County of San Diego by filing a Complaint. (ECF No. 1-3 at 2).

In the Complaint, Plaintiff asserts that she “was, at all time relevant herein, a natural person and a resident of Tukwila, Washington.” *Id.* ¶ 5. Plaintiff seeks, among other things, to certify a putative class that purports to include “[a]ll persons who, while physically located or residing in California and Washington. [sic] made or received one or more telephone calls with Defendant MONTEREY FINANCIAL SERVICES, INC. during the four year period preceding the filing of this lawsuit (the “Class Period”) and

1 did not receive notice at the beginning of the telephone call that their telephone
2 conversation may be recorded or monitored" (the "Class")." *Id.* ¶ 26. The Complaint
3 asserts causes of action against Defendant for violations of California Penal Code §§
4 630, *et seq.*, Washington Rev. Code §§ 9.73, *et seq.*, and California Business &
5 Professions Code §17200, *et seq.*, based on Defendant's alleged unlawful recording
6 and/or monitoring of telephone calls.

7 On November 25, 2013, Defendant filed an Answer denying the allegations in
8 the Complaint and reserving a number of affirmative defenses. (ECF No. 1-4).

9 On December 10, 2013, Defendant filed a motion to compel arbitration. (ECF
10 No. 1-5). On April 7, 2014, the state trial court ordered the action to arbitration on an
11 individual basis and dismissed the class claims. *Id.* at 41-42. On May 29, 2014,
12 Plaintiff filed a Notice of Appeal of the state trial court's order compelling the action
13 to arbitration on an individual basis. *Id.* at 43-45. On November 19, 2015, the state
14 appellate court affirmed the trial court's order compelling the action to arbitration and
15 reversed the trial court's order dismissing the class claims, leaving the determination
16 to the arbitrator as to whether the matter should be pursued as a class or individually.
17 (ECF No. 1-6 at 13-54).

18 On December 28, 2015, by joint stipulation, the parties waived their rights to
19 arbitrate Plaintiff's Complaint and agreed to litigate as if there were no arbitration
20 clause. (ECF No. 1-6 at 7-9). On January 20, 2016, the action was remitted to the state
21 trial court. *Id.* at 12.

22 On February 8, 2016, Defendant served Plaintiff with its First Set of Admissions
23 and its First Set of Form Interrogatories, requesting, in part, that Plaintiff "[a]dmit that
24 you were a citizen of the State of Washington at the time you filed the complaint in this
25 matter." (ECF No. 1-7 at 2-3). On April 19, 2016, Plaintiff served her Supplemental
26 Responses to Defendant's First Set of Form Interrogatories. In response to Defendant's
27 request for admission regarding Plaintiff's citizenship, Plaintiff stated,

28 As stated on page 2, paragraph 5 of Plaintiff's Class Action Complaint for
Damages and Injunctive Relief, filed with the Court on October 15, 2013

1 . . . Plaintiff is a resident of Tukwila, Washington, and has been “at all
 2 relevant time herein.” Further, as known by the Defendant, the finance
 3 agreement between the Defendant and Plaintiff, signed in August of 2011,
 4 specifically utilized a Washington State Resident Finance agreement, and
 5 lent money to the Plaintiff through its Washington State lender’s license.
 6 . . . Plaintiff admits . . . that she was a citizen of the State of Washington
 7 at the time she filed her complaint

8 *Id.* at 16.

9 On May 6, 2016, Defendants¹ removed this action to federal district court
 10 pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. §§ 1332(d)(2), 1453(b).
 11 (ECF No. 1). Defendants assert that the Court has jurisdiction under CAFA on the
 12 grounds that (1) the number of members of the proposed plaintiff class is not less than
 13 one hundred, in the aggregate; (2) the matter in controversy exceeds the sum or value
 14 of \$5,000,000, exclusive of interest and costs; and (3) any member of the class of
 15 plaintiffs is a citizen of a State different from any defendant.

16 On May 19, 2016, Plaintiff filed a motion to remand. (ECF No. 12). Plaintiff
 17 does not dispute that her citizenship is diverse from Defendants or that the number of
 18 putative class members is at least 100. Plaintiff contends that Defendants’ notice of
 19 removal was untimely, that Defendants waived their right to remove the case, and that
 20 the amount in controversy is indeterminate. Plaintiff further contends that exceptions
 21 to CAFA apply.

22 On June 6, 2016, Defendants filed a response. (ECF No. 15). Defendants
 23 contend that the notice of removal was timely, that they have not waived their right to
 24 remove the case, and that they carried their burden to show the amount in controversy.
 25 Defendants also contend that exceptions to CAFA do not apply. On June 13, 2016,
 26 Plaintiff filed a reply. (ECF No. 20).

27 **II. Request for Judicial Notice**

28 ¹ On April 1, 2016, Plaintiff filed a “Doe Amendment,” naming as a defendant,
 29 Monterey Financial Services, Inc.’s successor-in-interest, Monterey Financial Services,
 30 LLC. (ECF No. 1-8 at 2). For all events occurring after April 1, 2016, this Order will
 31 refer to Monterey Financial Services, Inc. and Monterey Financial Services, LLC as
 32 “Defendants.”

1 Plaintiff requests that the Court take judicial notice of screenshots from the
 2 United States Census Bureau website. (ECF No. 12-2). Defendants do not object.

3 Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a
 4 fact that is not subject to reasonable dispute because it . . . is generally known within
 5 the trial court’s territorial jurisdiction; or . . . can be accurately and readily determined
 6 from sources whose accuracy cannot reasonably be questioned.” Fed R. Evid. 201(b).
 7 [U]nder Fed. R. Evid. 201, a court may take judicial notice of ‘matters of public
 8 record.’” *Lee*, 250 F.3d at 689 (quoting *Mack v. South Bay Beer Distrib.*, 798 F.2d
 9 1279, 1282 (9th Cir.1986)). The Court will take judicial notice of the screenshots from
 10 the United States Census Bureau website.

11 **III. Timeliness**

12 Federal courts have original jurisdiction under CAFA where the number of
 13 proposed plaintiffs is greater than 100, there is a diversity of citizenship between any
 14 member of the class and any defendant, and the amount in controversy is more than
 15 \$5,000,000, exclusive of interests and costs. 28 U.S.C. § 1332(d). “A CAFA case may
 16 be removed at any time, provided that neither of the two thirty-day periods under §§
 17 1446(b)(1) and (b)(3) has been triggered.” *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720
 18 F.3d 1121, 1126 (9th Cir. 2013).

19 Plaintiff contends that Defendants removed this action in violation of the 30-day
 20 time limit of 28 U.S.C. § 1446(b). Plaintiff contends that the Complaint, filed in state
 21 court on October 15, 2013, gave Defendants notice of alleged facts establishing
 22 diversity jurisdiction. Defendants contend that Plaintiff’s Complaint was indeterminate
 23 as to citizenship and that Defendants received notice from Plaintiff affirmatively
 24 revealing her citizenship on April 19, 2016.

25 To remove a case from a state court to a federal court, a defendant must file a
 26 notice of removal. 28 U.S.C. § 1446(a). Under 28 U.S.C. § 1446(b), “a case may be
 27 removed during the first thirty days after the defendant receives the initial pleading or
 28 during the first thirty days after the defendant receives a paper ‘from which it may first

1 be ascertained that the case is one which is or has become removable' if 'the case stated
 2 by the initial pleading is not removable.'" *Harris v. Bankers Life & Cas. Co.*, 425 F.3d
 3 689, 692 (9th Cir. 2005) (quoting 28 U.S.C. § 1446(b)(1), (3)). "[N]otice of
 4 removability under § 1446(b) is determined through examination of the four corners of
 5 the applicable pleadings, not through subjective knowledge or a duty to make further
 6 inquiry." *Harris*, 425 F.3d at 694. "[D]efendants need not make extrapolations or
 7 engage in guesswork; yet the statute [28 U.S.C. § 1446] requires a defendant to apply
 8 a reasonable amount of intelligence in ascertaining removability." *Kuxhausen v. BMW*
 9 *Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013). For purposes of diversity of
 10 citizenship,

11 The natural person's state citizenship is then determined by her state of
 12 domicile, not her state of residence. A person's domicile is her permanent
 13 home, where she resides with the intention to remain or to which she
 14 intends to return. A person residing in a given state is not necessarily
 15 domiciled there, and thus is not necessarily a citizen of that state.

16 *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001).

17 In this case, Plaintiff alleges in the Complaint that she "was, at all time relevant
 18 herein, a natural person and a resident of Tukwila, Washington." (ECF No. 1-3 ¶ 5).
 19 The Complaint asserts causes of action against Defendant for alleged violations of
 20 California and Washington law. Plaintiff seeks to certify a putative class that purports
 21 to include "[a]ll persons . . . physically located or residing in California and Washington
 22 . . ." *Id.* ¶ 26. The Complaint does not reveal on its face facts to ascertain Plaintiff's
 23 state of domicile or citizenship to support removal under CAFA. *See Harris*, 425 F.3d
 24 at 695 (finding that the initial pleading did not affirmatively reveal information to
 25 trigger removal based on diversity where the initial pleading stated residency, not
 26 citizenship); *Kanter*, 265 F.3d at 857 (parties' actual citizenship, not residency
 27 determines diversity); *see also Ruano v. Sears Roebuck & Co.*, No. CV 15-6060-PSG-
 28 FFMx, 2015 WL 6758130, at *2 (C.D. Cal. Nov. 5, 2015) ("The thirty-day clock does
 not start ticking because Defendant could guess or speculate that class of California
 residents would include California citizens."). Plaintiff contends that even if the

1 Complaint did not put Defendants on notice of facts that could lead to diversity
 2 jurisdiction, Defendants received another “paper” on March 24, 2014 that put it on
 3 notice. (ECF No. 20 at 9).

4 On March 24, 2014, Plaintiff submitted a declaration in support of Plaintiff’s
 5 Opposition to Defendant’s Motion to Compel Arbitration stating, “I am resident of the
 6 State of Washington and at all relevant times herein was a resident of the State of
 7 Washington.” (ECF No. 1-9 at 112 ¶ 2). The declaration states that during the
 8 “summer of 2011,” Plaintiff received a phone call from Real Estate Investor Education.
 9 *Id.* ¶ 3. While “a party with the burden of proving citizenship may rely on the
 10 presumption of continuing domicile, which provides that, once established, a person’s
 11 state of domicile continues unless rebutted with sufficient evidence of change,” the
 12 declaration does not state that Plaintiff is domiciled in Washington; rather it states that
 13 Plaintiff is a resident of Washington. *See Mondragon v. Capital One Auto Fin.*, 736
 14 F.3d 880, 884 (9th Cir. 2013). “A person residing in a given state is not necessarily
 15 domiciled there, and thus is not necessarily a citizen of that state.” *Kanter*, 265 F.3d at
 16 857. The March 24, 2014 declaration does not state Plaintiff’s domicile or citizenship.
 17 The declaration is indeterminate as to citizenship. Defendants were not put on notice
 18 of Plaintiff’s citizenship until April 19, 2016, when Plaintiff stated that she was a
 19 “citizen” of Washington. Defendants filed the notice of removal on May 6, 2015, less
 20 than thirty days after the thirty-day removal period was triggered pursuant to 28 U.S.C.
 21 § 1446(b)(3). The Court concludes that Defendants’ Notice of Removal is timely.

22 **IV. Substantial State Court Action**

23 Plaintiff contends that remand is appropriate because Defendants waived their
 24 rights to remove by taking “substantial offensive and defensive action in the state court
 25 action” (ECF No. 12-1 at 20). Defendants contend that it did not waive its right
 26 to remove the case because the case was not removable until Defendants discovered
 27 Plaintiff’s citizenship.

28 A party “may waive the right to remove to federal court where, after it is apparent

1 that the case is removable, the defendant takes actions in state court that manifest his
 2 or her intent to have the matter adjudicated there, and to abandon his or her right to a
 3 federal forum.” *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th
 4 Cir. 1994). “A waiver of the right of removal must be clear and unequivocal.” *Id.*

5 In this case, the Complaint is indeterminate as to citizenship. After Defendants
 6 obtained Plaintiff’s admission regarding citizenship on April 19, 2016, Defendants filed
 7 a notice of removal in this court. There is no evidence in the record that Defendants
 8 took subsequent actions after it was apparent that the case was removable in state court
 9 that “manifest[ed] his or her intent to have the matter adjudicated there” *See*
 10 *Resolution Trust*, 43 F.3d at 1240. A waiver of the right of removal is not clear or
 11 unequivocal in this case.

12 **V. Amount in Controversy & CAFA Exceptions**

13 In this case, the amount in controversy is not facially apparent from the
 14 Complaint. In the notice of removal, Defendants stated that the amount in controversy
 15 exceeds \$5 million. Specifically, Defendants asserted,

16 California Penal Code Section 637.2 provides statutory damages of up to
 17 \$5,000 per violation of section 632 or section 632.7. The Declaration of
 18 Chris Hughes concurrently filed herewith, establishes that Monterey
 19 recorded well over 5,000 telephone calls to/from individuals **living in and**
calling from California alone during the class period. (Hughes Decl., ¶
 20 7) Thus, the amount in controversy exceeds the jurisdictional limit of
 21 \$5,000,000. *See Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 690
 22 (9th Cir. 2006) (courts may consider “summary-judgment-type evidence
 23 relevant to the amount in controversy at the time of removal”). Thus,
 24 although Defendant denies Plaintiff’s allegations of liability, injury, and
 25 damages and will oppose certification of the putative class, taking
 26 Plaintiff’s allegations to be true, this is a “civil action in which the matter
 27 in controversy exceeds the sum or value of \$5,000,000.” 28 U.S.C. §
 28 1332(d)(2).

29 (ECF No. 1 ¶ 19 (emphasis added)). The declaration provided by Defendant’s President
 30 and CEO Chris Hughes, who states that he is “responsible for oversight, operation, and
 31 function of every aspect of the business[,]” does not have a paragraph seven. (ECF No.
 32 1-11 ¶ 1). However, in paragraph six Hughes states,

1 Over the course of a four-year period preceding the filing of Plaintiff
 2 Tiffany Brinkley's Complaint, Monterey recorded well in excess of 5,000
 3 telephone calls from well over 1,000 different persons who were
 physically located or residing in California and/or Washington.

4 (ECF No. 1-11 ¶ 6).

5 Plaintiff contends that Defendants' removal is not supported by the requisite
 6 evidence to establish that this case exceeds the \$5 million amount in controversy
 7 threshold required under CAFA. Plaintiff contends that the amount in controversy
 8 would be less than \$5 million if the class members were located in Washington.

9 Defendants contend that federal court jurisdiction is proper because it has
 10 established by a preponderance of the evidence that the amount in controversy exceeds
 11 \$5 million. Defendants contend that “[n]othing in the Complaint purports to foreclose
 12 application of California law to every call allegedly recorded by Monterey, particularly
 13 as the Complaint alleges that Monterey recorded the calls from its place of business in
 14 California.” (ECF No. 15 at 14).

15 A federal court may assert subject matter jurisdiction over a class action under
 16 CAFA only if the aggregate amount in controversy exceeds \$5 million. 28 U.S.C. §
 17 1332(d). “If the plaintiff's complaint, filed in state court, demands monetary relief of
 18 a stated sum, that sum, if asserted in good faith, is ‘deemed to be the amount in
 19 controversy.’” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547,
 20 551 (2014) (quoting 28 U.S.C. § 1446(c)(2)). “When plaintiff's complaint does not
 21 state the amount in controversy, the defendant's notice of removal may do so.” *Id.*
 22 (quoting 28 U.S.C. § 1446(c)(2)(A)). “[W]hen a defendant's assertion of the amount in
 23 controversy is challenged . . . both sides submit proof and the court decides, by a
 24 preponderance of the evidence, whether the amount-in-controversy requirement has
 25 been satisfied.” *Dart Cherokee*, 135 S. Ct. at 554.

26 “If the plaintiff contests the defendant's allegation, § 1446(c)(2)(B) instructs:
 27 ‘[R]emoval . . . is proper on the basis of [an] amount in controversy asserted’ by the
 28 defendant ‘if the district court finds, by the preponderance of the evidence, that the

1 amount in controversy exceeds' the jurisdictional threshold." *Id.* at 553-54 (quoting 28
 2 U.S.C. § 1446(c)(2)(B)). When the court makes this determination, "the defendant
 3 seeking removal bears the burden to show by a preponderance of the evidence that the
 4 aggregate amount in controversy exceeds \$5 million when federal jurisdiction is
 5 challenged." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015).

6 Plaintiff further contends that the local controversy exception, the home state
 7 controversy exception, and the discretionary dismissal provision of CAFA each apply
 8 to this matter and prevent this Court from exercising CAFA jurisdiction. Plaintiff
 9 contends that each CAFA exception supports the remand of this action back to state
 10 court because more than two-thirds of the members of the class are from California.
 11 (ECF No. 12-1 at 28). In the alternative, Plaintiff requests an order from this Court
 12 "allowing Plaintiff to conduct jurisdictional discovery and requiring Defendant to
 13 submit substantive responses" to Plaintiff's interrogatories focused on the location of
 14 the individuals who receive calls from the Defendant "so that the Court can determine
 15 if [this action] falls within" the local controversy exception to CAFA. (ECF No. 12 at
 16 2). Plaintiff contends that Defendants have access to the addresses of class members
 17 because Defendants "continually asked Class members to affirm their addresses during
 18 their secretly recorded telephone calls." (ECF No. 12-1 at 28). In the alternative,
 19 Plaintiff contends that a review of the census data comparing the relative number of
 20 California citizens to the number of Washington citizens is sufficient to establish that
 21 the local controversy exception applies. (ECF Nos. 12-1 at 28, 12-7 at 2-3).

22 Defendants contend that no exception to CAFA applies to this matter because the
 23 Plaintiff has not carried her burden to satisfy any of the exceptions to the statute, and
 24 opposes jurisdictional discovery because it will be burdensome and "would accomplish
 25 nothing." (ECF No. 15 at 16, 19). Defendants contend that the Plaintiff's "proposed
 26 class is not limited to local-state (California) citizens[,] and includes "anyone who had
 27 a recorded call with [Defendant] while merely located or residing in California or
 28 Washington at any time during the four-year period preceding the Complaint." *Id.* at

1 18.

2 The local controversy exception to CAFA provides that a “district court shall
 3 decline to exercise jurisdiction over a class action in which greater than two-thirds of
 4 the members of all proposed plaintiff classes in the aggregate are citizens of the State
 5 in which the action was originally filed.” 28 U.S.C. § 1332(d)(4)(A). “[T]he party
 6 seeking remand to state court bears the burden of providing that the exception applies.”
 7 *Mondragon*, 736 F.3d at 881. The home state exception to CAFA provides that a
 8 “district court shall decline to exercise jurisdiction” under the statute if “two-thirds or
 9 more of the members of all proposed plaintiff classes in the aggregate, and the primary
 10 defendants, are citizens of the State in which the action was originally filed.” 28 U.S.C.
 11 § 1332(d)(4)(B). CAFA also contains a discretionary provision under which a court
 12 may decline to exercise jurisdiction so long as “greater than one-third but less than
 13 two-thirds of the members of all proposed plaintiff classes in the aggregate and the
 14 primary defendants are citizens of the State in which the action was originally filed
 15 based on consideration” of six discretionary factors. *See* 28 U.S.C. § 1332(d)(3)(A-F).

16 “[T]he party seeking remand bears the burden to prove an exception to CAFA’s
 17 jurisdiction.” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021-22 (9th Cir. 2007).
 18 The local controversy exception “is intended to identify . . . a controversy that uniquely
 19 affects a particular locality and to ensure that it is decided by a state rather than a federal
 20 court.” *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (2010) (per curiam)
 21 (internal citations omitted). In *Visendi*, the Court of Appeals found that CAFA’s home
 22 state exception was “related” to its local controversy exception. *Visendi v. Bank of*
 23 *America*, 733 F.3d 863, 869 n.3 (9th Cir. 2013).

24 Plaintiff’s proposed class includes citizens from both California and Washington.
 25 (ECF No. 1-3 ¶ 26). Defendants offer evidence regarding the individuals who received
 26 calls through Hughes’ declaration—however, there is no evidence in the record of the
 27 physical location of the “1,000 different persons.” *See* Hughes Decl. ECF No. 1-11 ¶
 28 6. The evidence may show that a majority of class members are from California and

1 California's statutory damages provision applies to this matter, and the amount in
 2 controversy may exceed \$5 million. On the other hand, the evidence may show that
 3 two-thirds of the class members are citizens of California, and a CAFA exception may
 4 apply to prevent federal jurisdiction.

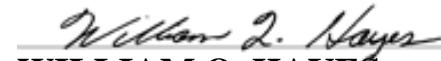
5 A court's "jurisdictional finding of fact should be based on more than
 6 guesswork." *Mondragon*, 736 F.3d at 884. "Discovery may be appropriately granted
 7 where pertinent facts bearing on the question of jurisdiction are controverted or where
 8 a more satisfactory showing of the facts is necessary." *Boschetto v. Hansing*, 539 F.3d
 9 1011, 1020 (9th Cir. 2008). In particular, jurisdictional discovery may be ordered to
 10 determine both whether a party seeking removal has met her burden of establishing the
 11 amount in controversy requirement, and whether a party seeking remand has met her
 12 burden of establishing the application of a CAFA exception. *See Mondragon*, 736 F.3d
 13 at 885 (permitting jurisdictional discovery to determine whether the remanding party
 14 met her burden to prove application of a CAFA exception); *Dart Cherokee*, 135 S. Ct.
 15 at 554 (noting that "when a defendant's assertion of the amount in controversy is
 16 challenged . . . both sides submit proof and the court decides, by a preponderance of the
 17 evidence, whether the amount-in-controversy requirement has been satisfied."). *See*
 18 *also Benko v. Quality Loan Service Corp.*, 789 F.3d 1111, 1121 (9th Cir. 2015)
 19 (recognizing that certain "jurisdictional facts, which exist independent of the complaint,
 20 may require evidentiary clarification if the pleadings themselves are insufficient."). The
 21 Court concludes that a more satisfactory showing is necessary before it can rule on the
 22 amount in controversy and the CAFA exception issues.

23 **VI. Conclusion**

24 IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 12) will remain
 25 pending during the period of jurisdictional discovery. The court will allow the parties
 26 a period of 60 days to engage in limited jurisdictional discovery regarding the amount
 27 in controversy requirement and the CAFA exceptions. The parties shall file any
 28 supplemental responses within 90 days of this Order, and any replies shall be filed

1 within 14 days of any supplemental response. Any discovery disputes will be resolved
2 by the Magistrate Judge.

3 DATED: September 15, 2016

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5 **WILLIAM Q. HAYES**
6 United States District Judge

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